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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1084

EULARIA M. GATEWOOD, OWNER OF THE MOTOR VESSEL "LILLIAN ANNE",
Petitioner,

vs.

W. S. SANDERS, OWNER OF THE MOTOR TUG "FAIRWILL", AND THE R. C. HUFFMAN CONSTRUCTION COMPANY, OWNER OF THE SCOW No. 72-H.

BRIEF FOR W. S. SANDERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BRIEF FOR W. S. SANDERS IN OPPOSITION

I. OPINIONS BELOW

The opinion of the District Court appears at page 5 of the record. The opinion of the Circuit Court of Appeals (R. 278) is reported in 152 Fed. (2) 379.

II. JURISDICTION

The order denying rehearing of the Circuit Court of Appeals was entered on February 5, 1946. (R. 304). The petition for a writ of certiorari was filed April 8th, 1946. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by

the Act of February 13th, 1925. Only the petitioner, Eularia M. Gatewood asks for a writ. The libellant, The R. C. Huffman Construction Company does not join in this petition.

III. STATEMENT OF FACTS

This suit arose out of a collision between a scow, the 72-H, owned by The R. C. Huffman Construction Company, and a Motor Vessel, the LILLIAN ANNE, owned by the petitioner, Eularia M. Gatewood. At the time of the collision the scow was being towed alongside by a diesel tug, the FAIRWILL, owned by W. S. Sanders.

The scow owner filed a libel against both the Motor Vessel LILLIAN ANNE, and the Tug FAIRWILL, and their respective owners, alleging negligence causing the collision, and the resultant damage to the scow, which was sunk.

The collision occured in Norfolk Harbor at a point opposite or slightly to the west of Wood's Dock, as was decided by the District Court, and not at a point opposite the Chesapeake Steamship Co. dock, as petitioner contends, in the early morning of November 5th, 1942. (See sketch of harbor lines R. 247).

The tug and scow were bound from the dumping grounds off Craney Island, in outer Norfolk harbor, to a dredge which was operating near the Ford Plant in the Eastern Branch of the Elizabeth River. The scow was lashed to the port side of the tug. The Motor Vessel, LILLIAN ANNE, had aboard 261 sailors, and she was bound from the Norfolk Navy Yard on

the Southern Branch of the Elizabeth River to Solomon's, Maryland.

While the LILLIAN ANNE was at first proceeding in a general northerly direction, yet sometime before the collision, she altered her course to the east, heading for Wood's Dock on the Norfolk side of the harbor (R. 91). When the tug was sighted the LILLIAN ANNE went even farther to the east heading towards the ferry slips on the Norfolk side (R. 92, 195, 196). The vessel's helm was twice changed to the starboard. Martin, the mate on the LILLIAN ANNE, stated that after changing the vessel's course to starboard, he then gave her a left wheel (R. 128). Since the tug had made her turn to the left and was headed towards Eastern Branch, this brought the two vessels on approximately head-on courses.

The tug and tow were proceeding very slowly, at about two miles an hour (R. 28, 95). The LILLIAN ANNE's speed was much greater. Both the District Court and the Circuit Court of Appeals held that the speed of the LILLIAN ANNE was excessive, particularly in "a busy harbor abnormally crowded under war time conditions" (R. 9, 281). Estimates of this speed ran from 4½ to 10 or 12 knots per hour (R. 172, 196, 69, 189).

George K. Hudgins was in the tug's pilot house in charge of her navigation. He had seen lights to the right ahead, but he first identified the LILLIAN ANNE when she blew a one whistle signal which indicated a desire on her part to pass the tug and tow port to port (R. 26, 42). The LILLIAN ANNE was then about a point or a point and a half on the tug's

starboard bow, 400 to 500 yards off, according to Hudgins' estimate, showing the tug only her red light (R. 26, 42), and the tug was a little down the river from Wood's dock (R. 26, 31) and heading up, or in the direction of, the Eastern Branch—she had already made the turn to the left off the old dock of the Chesapeake Steamship Company (R. 51). The tug immediately assented by answering the LILLIAN ANNE with one blast, and put her helm hard right, as there was then plenty of time and room to carry out the proposed maneuver (R. 31, 33, 34, 42). The tug and tow began swinging to starboard, but of necessity her swing was slow due to the heavy tow and slow speed at which the tug was proceeding.

Hudgins watched the LILLIAN ANNE closely. Her red light moved across the tug's bow until it was on her port bow (R. 43), which satisfied Hudgins that the LILLIAN ANNE was swinging to her starboard, also, and doing what she was required to do to safely carry out the proposed passing. When the LILLIAN ANNE was a short distance off, she steadied up, and Hudgins thought she was crowding the scow—trimming her too closely—so he gave her a second one blast signal to which no reply was received (R. 32, 33, 34, 43, 50). In a matter of seconds thereafter, when it was observed the LILLIAN ANNE was not heeding the tug's second one whistle, but on the contrary was swinging in more toward the scow, the tug's engines were reversed and the backing whistle—three short blasts—was sounded to advise the LILLIAN ANNE (R. 34, 43, 44). The reverse action of the tug's engine swung the tug's bow to starboard (R. 44, 45). The LILLIAN

ANNE was also reversing and since the LILLIAN ANNE had a left handed engine, the effect of a full speed astern on her engines was to cant her bow to port and into the scow (R. 96).

The LILLIAN ANNE struck the scow head-on near her port forward corner, damaging her so severely that she sank within five minutes. When the impact came, the tug and tow had lost all headway and they had swung about three and a half points to starboard (R. 162, 35).

The only signal heard from the LILLIAN ANNE was the one whistle initiating the port to port passage (R. 33).

After the collision the LILLIAN ANNE backed quickly off and passed on down the river without speaking to the tug.

Hudgins summed up the circumstances leading up to the collision in this brief and expressive language:

> "A. I think I know, sir, what was required. When I got that man's whistle, his one-blast signal, it was my duty to answer it, wasn't it?
>
> Q. Go ahead.
>
> A. I did so and I gave him just what he asked for. I righted my wheel. He swung, and I swung to the port passing and everything looked all right, looked clear, and I said, 'Everything will be all right', and he straightened himself up on me, you know, and I blew him another. I said 'Look here, you are not pulling off enough', and I never heard no answer, and it was close then." (R. 50)

Not only does the libellant, The R. C. Huffman Construction Company contend that there were two

white lights on the scow, but in addition every witness in the case, including the two neutral witnesses, Jones and Whitehurst, testified to this. Only those on the LILLIAN ANNE testified to the contrary. One of these lights was on the forward port corner of the scow and the other on the stern on top of the pump house. (R. 158). Both were visible to vessels approaching from ahead (R. 167, 164, 169, 170, 171, 216, 217, 186).

IV. ARGUMENT

A. THIS CASE CONCERNS QUESTIONS OF FACT ONLY.

The District Court, before whom every one of the seventeen witnesses in this case, testified in person, held that the collision was caused solely by the negligence of those on the LILLIAN ANNE in failing to keep a vigilant lookout and in proceeding at a rate of speed excessive under the circumstances then existing, and in failing to see the scow until the vessel was almost on top of it (R. 5, 8, 9). The Circuit Court of Appeals affirmed this holding. Every single charge of negligence against the tug and scow now asserted in this court by the petitioner was argued at great length in both of the lower courts, and after the most careful consideration there, decided against the petitioner.

In these courts the petitioner accused the tug of the following negligence:

(1) In not having a competent person in charge of the tug.

(2) In that those on the tug did not see the LILLIAN ANNE until it was too late to avoid the collision;

(3) In that the tug disregarded the rules of navigation;

(4) If it were a crossing case, the tug was still at fault;

(5) The tug was at fault for not properly placing her lookout;

(6) The scow was improperly lighted, if at all;

(7) There was a duty on the tug to blow danger signals and to go astern sooner than she did.

All of these accusations as *matters of fact* were decided adversely to the petitioner. Yet here in this Court we find petitioner asserting them again. The evidence clearly supports the findings of the courts below. Indeed, a contrary conclusion would be in the very teeth of the evidence.

Petitioner refers in her petition to admissions of fault made by the mate of the tug. There were no such admissions. She likewise states in her petition that "there was no dispute of fact on the question of the negligence of the tug FAIRWILL". Obviously this, too, is untrue. If it were true, it would be quite difficult to explain the actions of the District Court and the Circuit Court of Appeals, both of whom have held the tug entirely free from negligence, and have placed the blame for this collision entirely upon the petitioner.

Petitioner apparently expects this court to consider this matter for two reasons.

She claims, first, that the decisions of the two lower courts are of an important maritime question of local application conflicting with the applicable decisions, and secondly, that these decisions have, so far departed from the accepted and usual course of judicial procedure as to call for the exercise of this Court's supervision.

The trouble with petitioner's reasoning is that she shows no conflict with applicable decisions, and no departure from the usual course of judicial procedure *except by adopting the testimony of her witnesses only, and excluding the testimony of the tug's and other witnesses.*

In other words, there was no dispute as to the law; only a series of disputes as to the facts, all of which have been decided adversely to the petitioner.

The petitioner says, for instance, that the mate in charge of the tug was incompetent. The District Court and the Circuit Court have decided he was competent.

The petitioner says that those on the tug did not see the LILLIAN ANNE until too late to avoid the collision. The two lower courts say that those on the tug saw the LILLIAN ANNE at or before those on the LILLIAN ANNE saw the tug, when there was plenty of time to maneuver for a port to port passage, and that the collision was caused by the failure of the LILLIAN ANNE to properly carry out that agreed maneuver.

And so on as to every single charge of fault made here as to the tug.

It is well settled that this court will not reverse a finding of fact where there is substantial evidence to

support such finding (*The Abbotsford,* 98 U.S. 440; *Benson Mining Company v. Alta Mining Company,* 145 U.S. 428, 434; *Egan v. Hart,* 165 U.S. 188; *Davis v. Schwartz,* 155 U.S. 631, 638; *German Savings Society v. Dormitzer,* 192 U.S. 125, 129) even though the evidence be conflicting (*Louis. & Nash. R.R. v. United States,* 238 U.S. 1, 10, 11).

Petitioner invokes the rules of *The Pennsylvania,* 19 Wall. 125, where it was held that a vessel having violated a statutory rule intended to prevent collisions, must uphold the burden of showing that the violation could not have been a contributing cause of the collision.

Neither the District Court nor the Circuit Court of Appeals has disputed the validity of this decision, nor was there any departure, therefrom.

These courts held that the tug had sustained the burden of establishing that whatever slight violations of statutory rules there may have been on her part, were not contributing causes of the collision, which is exactly in conformity with the rule laid down in the *Pennsylvania* upon which petitioner is relying.

Petitioner claims, for instance, that the lookout on the tug and scow was improperly placed, and cites several cases to support this proposition, including *N. Y. P. & N. Co. v. Wilkins,* 257 Fed. 42, a case from the Fourth Circuit. The District Court, however, decided that since the lookout on the tug sighted the LILLIAN ANNE in ample time, this alleged fault could not have contributed to causing the collision (R. 8, 14). The Circuit Court of Appeals concurred

in this. (R. 281, 282). These two courts are amply supported in this conclusion by such cases as:

The Farragut, 10 Wall. 334, 338; 14 Led. 946;
The Dexter, 23 Wall. 69; 23 Led. 84;
The Pocomoke (E.D. Va.), 150 Fed. 193, 198.

Again there was no departure from the accepted cases; merely a decision of fact which made the rule in *The Pennsylvania* inapplicable.

We respectfully submit that the real questions in this case are all fact questions.

That there was substantial evidence to support all of these findings will be shown in what follows in this brief.

Of necessity, our argument on these numerous fact questions must be detailed because our opponents have made their charges in detail, and we must answer them in like manner.

B. ALL OF THE QUESTIONS OF FACT WERE DECIDED AGAINST THE PETITIONER AND THERE WAS AN ABUNDANCE OF EVIDENCE TO SUPPORT THIS ACTION OF THE LOWER COURTS.

(1) The mate Hudgins was thoroughly competent.

Our opponents have gone to great lengths in their efforts to paint a picture of George K. Hudgins, the Mate on the FAIRWILL, as the very acme of incompetency. However, the conclusions they have reached are not proper inferences from the facts proven. Wher-

ever an unfavorable inference may, by some strained construction of the facts, be drawn, they have drawn it. We are confident that this Court will not be mislead by these tactics.

Hudgins was a resident of Matthews County, Virginia. He had a Second Mate's and Pilot's license for an extensive territory. He had had these licenses for thirty-five years. (R. 38). He had no license for Norfolk Harbor.

For fourteen years he had been employed navigating passenger vessels of the Merchants and Miners Steamship Company plying between Norfolk and Boston and Providence, Rhode Island. He had served on these vessels as sailor, quarter-master and second mate. (R. 38, 39). He had been second mate for seven or eight years. After he left the Merchants and Miners he had engaged in operating fishing boats, vessels about 70 feet long. He owned such a boat and navigated it.

At the outset let us state that no license of any kind is required for masters of diesel tugs. Hutson, the Master of this tug didn't have one. Millard Gray, who was in charge of the tug did not have one. A canvass of the diesel tug masters in Norfolk Harbor would show that the vast majority of them have no license because the law does not require it. Consequently, no unfavorable inference can be drawn because Hudgins' license did not cover Norfolk Harbor.

The Inland, 45 F. (Supp.) 265, cited by petitioner, concerns a situation where the master of the tug had no license at all and the Court said "that might indicate a lack of experience". We assume that if testimony had been introduced in that case, as in the instant case, show-

ing affirmatively that the master had had considerable experience, that even in that case, the lack of a license would have not been considered. But, of course, the case is not in point at all because the mate in the instant case did have an extensive license and a great deal of experience, which facts totally differentiate the instant case from the case cited.

The insinuation is made that because Capt. Hutson selected Millard Gray as the man in whose charge he would leave the tug, that Hutson had no faith in Hudgins. This is entirely unfounded. Gray himself said that the Captain had told him he had selected him because he wanted Sanders, the owner, then in Florida, to be satisfied. (R. 221, 222).

Gray had been in charge of the tug on other occasions, and Sanders had considerable confidence in him. He had been in Sanders' employ for a long period. (R. 211, 212). Hudgins was quite unknown to Sanders. He did not remember even having met him. (R. 228). What was more natural than for Hutson to select Gray, a selection he knew Sanders would approve! But this selection did not mean that he thought Hudgins incompetent. In fact he knew that Hudgins would be in sole charge of the navigation of the tug when he was on watch—just as he had when Hutson was himself on the tug. Apparently Hutson had confidence in Hudgins.

As pointed out by the petitioner, he had had no extended experience in the lower harbor of Norfolk, and no experience in navigating a tug boat before his service on the FAIRWILL. These seem to be the principal facts upon which the charge of incompetency is based.

However, the navigation of a tug is subject generally to the same rules as the navigation of any other vessel. It is, after all, *navigation*. There is no peculiar art in the navigation of a tug. She has a whistle, an engine and a rudder, just as other vessels have. The faults charged against this mate, to-wit: lookout, backing, alarm signals, if proven and if material, would have been faults on a larger vessel.

But in addition, this mate had stood his regular watches for 21 days on this same tug. She operated the full 24 hours without stopping. (R. 40, 41). If she made an average of three round trips in 24 hours and he was on duty one-half of the time, he had stood at the helm of that tug navigating the same tug and the same scow over the same course for 31 round trips in daylight and at night, in all kinds of weather, back and forth, between the Dredge at the Ford Plant and Craney Island. In all of this time he had had no trouble of any kind. He not only had in this experience sufficient to give him a good working knowledge of the lower harbor of Norfolk, and of handling tugboats and barges in general, but he also knew how to handle on this course this particular tugboat and this particular scow. All boats have their peculiarities.

And this experience was, we submit, ample to acquaint him with the harbor insofar as the course the tug was following was concerned. He may very reasonably not have known where the sections of the harbor were by name. Just as he was unable to identify the Southern Branch by name on the chart. But that by no means indicates that he did not know where custo-

marily the heavier flow of traffic came from, as he had observed in his 21 days of experience.

He could not glibly reply to questions regarding certain navigational rules when he was asked to recite them by article and number. But he was not deficient in a knowledge of these rules when he was able to identify the rule being discussed. He had an instinctive knowledge of seamanship which was entirely sufficient in itself. He had no trouble in understanding what the LILLIAN ANNE desired. He promptly answered her signal, starboarded his wheel and in every way handled the situation, in a manner which, in our opinion, was not subject to criticism.

Our point is that this man was honest and instinctively skilful, despite the fact that under the wily questioning of extremely able admiralty attorneys, he became easily confused and was slow to catch the point, and awkward in escaping a trap.

Proctor for petitioner makes the point-blank statement on page 13 of his brief that this man's eye-sight and hearing were bad. Yet the very reference given to support this statement (R. 27) shows that all the mate had said was that he had been ill shortly before the trial and that his hearing was not then good and his eyesight was not as good as it had been. The case was tried on October 23-25, 1944 and the collision happened on November 5, 1942. The mate testified positively that his hearing was all right at the time of the collision (R. 33) and no one asked him in regard to his eyesight. However, we submit that his alert sighting of the LILLIAN ANNE and his account of her movements after he sighted her was proof of the fact that his eyes

were all right. It is worthy of note that the District Court was of the opinion that he sighted the LILLIAN ANNE before Gatewood, who with Martin, was in the pilot house of the LILLIAN ANNE, sighted the tug. (See Opinion R. 5).

We plead guilty to the charge made by Proctors for Petitioner that Hudgins was an elderly man (p. 13). But we submit that this does not mean that he was not a competent navigator.

Nor can we agree that the reason Hudgins said "Call me by name. I never was Captain in my life" (R. 54) indicated, as petitioner argues, a consciousness of shortcoming. Hudgins was a simple uneducated man who had never attained the grade of captain. His rank was Second Mate, and it irritated him to be addressed by a title which did not belong to him.

Proctor for petitioner closes his attack on Hudgins with the sentence, "After the collision, the engineer, Gray, took over the navigation" (p. 14). In the lower court he argued that this was evidence that Gray thought Hudgins was incompetent and would no longer permit him to navigate the tug.

However, this is just another strained inference. Gray says that there was some doubt as to who navigated the tug for the remainder of the voyage to the dredge. He thinks both he and Hudgins had a spell at it (R. 220). But Hudgins had completed his watch at 6 A.M. and he was only handling the wheel in order to allow Gray to get his breakfast, and if Gray did resume his position at the wheel, the procedure was only a routine one. (R. 37, 41).

It is quite difficult for us to put on paper the very definite impression which Hudgins made on everyone in the court room except our opponents, that he was a truthful, experienced navigator. However, we point to the fact that the Judge of the District Court had the opportunity to observe this man's demeanor and watch his reactions to the questions asked, and that he has indicated his belief in what Hudgins said by his decision of this case, and that he did this in the face of the very same arguments now being made by our opponents.

(2) The mate on the tug saw the LILLIAN ANNE in ample time, and, therefore, the position of the lookout has nothing to do with this case.

Our opponents argue that the mate on the tug did not see the LILLIAN ANNE until she was 75 or 100 yards from the tug. They argue also that the lookout on the tug was improperly placed. Proctor for petitioner says he should have been placed on the end of the scow.

The fact has been determined to be, however, that Gatewood on the LILLIAN ANNE, and Hudgins on the tug, saw the tug and motor vessel, respectively, at very nearly the same moment and at a distance of either 400 or 500 yards or more, as Hudgins stated (R. 42), or at a distance of 800 yards or more, as Gatewood said (R. 87), the exact measured distance depending on which of these two men more accurately estimated the distance, and at any rate at the time when the LILLIAN ANNE blew her one whistle signal (which

was the only one whistle signal blown by her), and we submit *that the whole argument as to the position of the lookout on the tug collapses.*

We say this because we think that all parties will admit the well established principle of law that if those on a vessel sight an approaching vessel seasonably, the question of where the lookout is stationed becomes utterly and entirely immaterial.

The mate testified that he saw the LILLIAN ANNE at a distance of 400 or 500 yards (R. 42).

Petitioner's Proctor says at page 14 of his brief:

> "His (Hudgins') attention was then directed to the testimony which he had given before the U. S. Inspectors, under oath, less than a month after the collision at which time he swore to the fact that this distance between the two vessels was only '75 or 100 yards' ".

However, this is not a fair statement of what actually happened. Hudgins himself voluntarily brought out the fact that he had made a mistake in his testimony before the inspectors in regard to his distance, and Hudgins did this at the very first mention of this distance in the trial of the case. (R. 27). He further stated that five minutes after he had so testified and after the Inspectors' hearing was completed, and he had had time to think it over, he realized that he had made an error in estimating this distance as such a short one; that in view of the whole situation and what happened therein, the distance must have been greater—at least 400 or 500 yards, and perhaps more. (R. 42). He was certain the distance was ample for passing and sufficient to avoid a collision. (R. 49).

It is hardly fair to say to this sea-faring man, "You are guilty of negligence. It is true that you saw the LILLIAN ANNE at a sufficient distance to allow a safe passage. But when you first estimated this distance, you erred. It is now too late to correct that regardless of what the truth is. You are guilty of negligence in not having a proper concept of distance measured in yards." Yet, this is what proctor for the LILLIAN ANNE is saying to him.

But there is the strongest kind of admitted evidence which shows that the mate saw the LILLIAN ANNE at a far greater distance than 75 or 100 yards.

The mate testified that what first attracted his attention to the LILLIAN ANNE was her one whistle signal, that he saw her lights at the same time he heard the one whistle. (R. 31). He answered this one whistle signal promptly with a one whistle from the tug. (R. 31, 42). Now certainly he had seen the LILLIAN ANNE when he did this. He was not blowing the tug's whistle just for fun.

But when Gatewood blew his one whistle he said *at that time* the FAIRWILL was 800 yards or more from the LILLIAN ANNE. He blew the whistle simultaneously upon sighting the tug, (R. 77) and the distance was *then 800* yards.

But this was exactly the same moment when the mate saw the motor vessel. The difference is merely one of estimation. The mate estimated the distance at 400 or 500 yards, and Gatewood at 800 yards, and Martin at 750 yards (R. 199). In any event, it was an ample distance.

And like the parts in a picture puzzle comes the testimony from Gatewood that immediately after he blew that one whistle (the only one whistle he blew) he directed his course to the starboard (R. 92), and the confirming testimony from the mate that immediately after the exchange of whistles he noticed the LILLIAN ANNE turn to the starboard (R. 42, 43).

Jones was sitting on the Wood Towing Company's dock awaiting the arrival of the tug HELEN of the Wood Company upon which he was then employed (R. 184). What first attracted his attention was a one whistle signal from the FAIRWILL. (R. 188). At this time he said the LILLIAN ANNE was coming from the general direction of Southern Branch, and the FAIRWILL was headed towards Eastern Branch. (R. 120, 188).

After the first one whistle signal from the FAIRWILL, he said he heard a second one whistle signal from the FAIRWILL (R. 189), and to neither of these was there any reply from the LILLIAN ANNE, nor any slackening of her speed (R. 190, 191); that he next heard a three whistle signal from the tug and could see that she and her tow were backing (R. 190); then almost at the time of the collision or immediately before, he heard a three whistle signal from the LILLIAN ANNE. (R. 190, 191).

If we were to believe Gatewood, we would have the LILLIAN ANNE blowing not one set of backing whistles, but two, one at 600 feet from the FAIRWILL and one in answer to the FAIRWILL's three whistles. (See log of LILLIAN ANNE). (R. 145).

In the lower court proctor for Huffman in his brief filed therein, calculated that if the tug were proceeding at two miles per hour and the LILLIAN ANNE at eight miles per hour, they would traverse the space of 75 to 100 yards in less than one-half a minute.

But proctor was conservative when he said "less than one-half a minute". Actually, if the tug were proceeding at two miles per hour and the steamer at eight miles per hour, then the combined speed was 880 feet per minute, and *they would meet in 21 seconds.* If the LILLIAN ANNE were proceeding at four and one-half miles per hour, as Gatewood testified, and the tug at two miles per hour, they would be coming together at the rate of 605 feet per minute, and they would traverse 100 yards in just 30 seconds.

Yet in this brief period of "less than one-half a minute" petitioner would have this Court believe that all of the whistle signals which the witness, Leroy Jones, has testified to, were blown, and all of the engine signals and engine movements were made. If the LILLIAN ANNE blew a one whistle signal and the FAIRWILL blew two one whistle signals, the LILLIAN ANNE blew one or two three whistle signals, and the FAIRWILL blew one three whistle signal, *the air surely must have been full of whistles.*

We have Captain Gatewood as an authority that it takes time to sound whistles, ring bells and telegraphs. (R. 93).

The obvious answer is that the vessels were not just 75 or 100 yards apart when Hudgins first sighted the LILLIAN ANNE; that they were a much greater

distance apart, and that all of these whistle signals did not occur almost simultaneously but were spaced over a much greater period of time than "less than one-half a minute".

We have deliberately recited the testimony as to the whistles from the mouth of Leroy Jones because he was not a member of the crew of the FAIRWILL, or even aboard her.

But if we turn to Hudgins' own testimony and recall that he said he first received a one whistle signal from the LILLIAN ANNE, that he immediately answered this with a one whistle signal, and directed his vessels to the starboard, and then watched the LILLIAN ANNE, noticed that at first she seemed to be turning to her starboard but then appeared to be steadying up, whereupon the vessels still not being in danger of collision, he blew as a warning a second one whistle signal, and received no answer, and the LILLIAN ANNE continued her steadying up, whereupon he blew backing signals and put his vessel astern and had completely killed the tug's headway and possibly she was going astern at the time of the collision—we know that all of this could not have been done within "less than one-half minute". Yet we have Huffman's mathematical calculations that the vessels were approaching at 880 feet a minute, and if they were 75 or 100 yards apart, less than 30 seconds would elapse to cover that space. Again the answer is that they were a far greater distance apart.

Martin, the mate on the LILLIAN ANNE, said that between the time Gatewood sighted the tug and the collision a period of 3½ to 4 minutes elapsed. (R.

204, 205). Leroy Jones says that 3 or 4 minutes elapsed between the tug's two one whistle signals. (R. 189). All of this suggests a substantial period of time between the first one whistle signal, when Hudgins sighted the LILLIAN ANNE and the moment of collision, and with the vessels' combined speed being between 700 and 900 feet a minute, we know that the mate sighted the LILLIAN ANNE at at least 500 yards.

Petitioner argues on pages 16 and 17 of his brief that Eugene Hudgins came on the deck of the tug when a one whistle signal was blown and that at that time the LILLIAN ANNE was very close to the tug. Shortly after this one whistle signal the three whistle signal was blown. He says, "Remember that this is the one blast signal from the tug which mate Hudgins says he gave when he first observed the LILLIAN ANNE".

But this is not the fact, and the argument is faulty in that proctor has seized on the wrong one whistle signal. Hudgins testified positively that he blew two one whistle signals. (R. 34). The first one whistle signal was blown in reply to the LILLIAN ANNE's one whistle signal and very close to the time that Hudgins first sighted the LILLIAN ANNE, after which he watched her closely, noticed that she first went to starboard, and then began cutting in towards him, whereupon he blew a second one whistle signal. This was the signal which brought Eugene Hudgins to the deck of the tug, and of course very shortly thereafter the tug blew its three whistle signals.

If we were to accept proctor's theory on this point we would have the tug blowing only a single one

whistle signal. But we know this is not the fact, not only from what Hudgins (R. 34), Merritt (R. 210), and Gray (R. 214) said, but also from the testimony of Jones (R. 188, 189). And we know that Eugene Hudgins heard the second one whistle signal because he came out on deck just before the backing whistle, and when the vessels were close together.

Exactly the same comment may be made in the reference to the testimony of Thurman Woodard on page 18 of the Petitioner's brief. The whistle which he heard "just as he was starting out of the engine room" was the second one whistle signal, not the first one, and the vessels were then comparatively close together.

On page 24 of the Petitioner's brief it is argued that the scow was a dark object discolored by mud, and that due to the fact that it had a free-board of 8 or 10 feet, it formed an obstruction to anyone looking from the tug. There was no evidence that the scow was discolored by mud. There was positive evidence that the mate in the pilot house of the tug could see all around the horizon and over the scow. (Whitehurst, R. 178).

There is absolutely no justification for the conclusion drawn by petitioner that this one blast whistle was in no sense the regular loud signal. He has picked this conclusion out of the thin air.

Perhaps we ought also to comment on the remarks regarding the refusal of the lower court to admit into evidence the affidavit of George K. Hudgins. This was not offered until long after the trial had been completed and the opinion of the lower court filed. Proctor for Huffman had it in his file at the trial but apparently

did not think it worth while to then introduce it. The lower court rejected it because it was an unsupported affidavit not offered to Hudgins as a witness to contradict him, but simply as an affidavit. However, our opponents have referred to it in their brief as though it had been introduced into evidence.

We respectfully submit that the District Court was fully justified in holding in its Findings of Fact number 7 that Hudgins saw the LILLIAN ANNE in ample time (R. 14) and that the Circuit Court of Appeals was justified in affirming this holding.

(3) The Tug disregarded no navigational rules.

Petitioner argues that the tug violated Article 18, Rule 1, of the Pilot Rules.

The LILLIAN ANNE had blown a single blast indicating a port to port passage, and the tug had promptly answered this with a single blast expressing agreement in the port to port passage. It then became the tug's duty to go to her starboard. This was exactly what she did. (R. 42, 35).

Petitioner claims the tug went to the port and crossed the LILLIAN ANNE's course. She made the same claim in both the District Court and the Circuit Court of Appeals. Both of these courts decided against the petitioner.

Much of the petitioner's difficulty on this point springs from her insistence that the collision occurred off the Chesapeake Steamship Company's dock, and just as the tug was making her turn towards Eastern Branch. But the great weight of the evidence is that

the collision occurred off the Wood Towing Corporation's dock and long after the tug had made her turn towards Eastern Branch.

The District Court held that the collision occurred off Wood's Dock (R. 6, 12), and the Circuit Court of Appeals refused to disturb this finding (R. 280, 281).

We can see no reason to repeat all of the detailed argument on this point. It is just one more question of fact decided against the petitioner in the two lower courts, and the holding on which will not ordinarily be disturbed by this Court.

(4) This case is not a crossing case, and even if it were, the tug did everything it could to avoid collision.

Proctor for petitioner, during his examination of Hudgins, the master of the tug, touched on Article 19 of the Pilot Rules, the so-called "crossing rule".

Admittedly, the case was not a crossing case. Both the District Court and the Circuit Court of Appeals held that the vessels were on meeting courses, not crossing courses (R. 7, 13, 279, 280).

Petitioner, in her answer, alleged that it was a passing case. (R. 148). Gatewood testified under oath that it was a passing case. (R. 96, 99). His action in blowing a one whistle, and in directing his course to starboard would have been utterly inconsistent with a crossing case where the one whistle would have been unnecessary and misleading, and where the absolute duty would have rested on him to hold his course. There was no dispute that the LILLIAN ANNE

struck the scow head-on, and not at right angles. (R. 94, 202).

It has been repeatedly held that the starboard hand rule has no application to vessels meeting in a channel although at some time, due to a bend in the channel course, their respective headings were such that their courses, if prolonged, would cross; that the course of a vessel is its apparent course and not her bearing at any given moment. *The Victory v. The Plymothian,* 168 U.S. 410, and particularly at page 418.

But even if this were a crossing case, we cannot see that the navigator of the tug could have done anything other than he did. He put his helm to the starboard immediately upon sighting the LILLIAN ANNE, and he maintained his speed for headway only. Since the speed was only 2 miles per hour, and he had a heavy scow in tow, he would have lost control had he immediately stopped. He did the very thing which the HAVEN BELLE did in the case cited by petitioner, *The Haven Belle and The Seminole,* 85 F. (2) 939, that is "to steer her course to the starboard and pass under the stern of the SEMINOLE", and the Court in that case approved that course (p. 941). In addition, he did everything he could to keep clear, and he would have done so, had the LILLIAN ANNE not cut into the scow.

(5) The scow was properly lighted, and the proximate cause of the collision was the failure to keep an alert lookout on the LILLIAN ANNE.

Practically every member of the crew of the FAIRWILL testified that there were two lanterns on the scow, one on the forward port corner against the combing, and one on the starboard on top of the pump house. These lanterns showed for a distance of five miles. They stood at least eight feet above the surface of the water, and they should have been seen by those on the LILLIAN ANNE. (R. 109, 110, 55, 217). But the crew of the FAIRWILL were not alone in testifying that these lights were properly placed and lit and showing brightly.

Woodard, an employee of the Huffman Construction Company, who had charge of the scow for that Company, testified that it had two lanterns in good condition, burning bright, visible at a distance of four or five miles; one of them was forward near the port bow corner of the scow, and the other was aft on the top of the pump house. (R. 158, 159). After the collision he used the forward lantern to examine the damage to the scow (R. 166, 167) and to go down into her hold (R. 167). He then put it down on the deck, and when the scow sank, he saw both lanterns still burning brightly as she sank (R. 166, 167). He remembered a conversation between himself and Graham Whitehurst, the Government Inspector, in which the latter asked him why he didn't retrieve the lantern (R. 167). So also does Graham Whitehurst (R. 171).

Whitehurst's testimony and that of Woodard have every earmark of a definite recollection.

Woodard testified that the forward lantern could be seen by a vessel approaching from any angle in front of the scow (R. 167).

Graham Whitehurst, who had no connection with either vessel, and who was on the FAIRWILL merely to discharge his duties as a government inspector, told in considerable detail the exact position of the lights on the scow, and reiterated that they were brightly burning and could be seen for a distance of four or five miles (R. 169, 170).

Leroy Jones, who also had no connection either with the tug or the LILLIAN ANNE, and who at the time he testified was employed as a deck hand on a Pennsylvania Railroad steamer, corroborated what Whitehurst had said about these lights. At the time he saw the collision he was sitting on the Wood Towing Company's dock waiting for the Tug HELEN upon which he was then employed. He not only was utterly unbiased, but in addition he had a ringside seat. He said the scow had two white lights, one on the bow and one on the stern, both burning brightly (R. 186, 187).

Turning from this overwhelming evidence we find Captain Gatewood and Mate Martin, of the LILLIAN ANNE, asserting flatly that not only did they see no lights on the scow at a distance of 800 yards, but *that they never saw any lights on the scow even after the collision at a distance of four feet.*

Couple this with the amazing fact that the evidence from the neutral witnesses and from the witnesses on the LILLIAN ANNE was that the bow of that vessel

hit so close to the point where the forward lantern was that this lantern was overturned by the blow, and we have a situation where lack of alertness has certainly been proven (R. 166).

See The Transfer No. 8 (D.C.), 14 F. (2) 448, 452 (C.C.A. 2d), 25 Fed. (2d) 628, 629, where it was held that the fact that an approaching vessel struck at the point where the light was located, was strong evidence of a lack of alertness.

When we find Gatewood and Martin asserting that Gatewood was keeping a close look-out as the LILLIAN ANNE approached the tug and scow, and yet didn't know that the scow was ahead of him until the LILLIAN ANNE was almost on top of her (Gatewood said he first saw the scow at a distance of 25 feet), (R. 101), we are forced to one of two conclusions, the charitable one of which is that neither Gatewood nor Martin were alert, and Gatewood was certainly not watching out ahead of him; that the noise and confusion created by the passengers drowned out the sounds from other vessels.

The LILLIAN ANNE had aboard 261 officers and sailors (R. 60). Although Captain Gatewood tried to claim that he did not allow these men forward of a line abreast of the pilot house (R. 61), it developed from Underwood, a member of the crew of the LILLIAN ANNE, that the line was not abreast of the pilot house but 6 feet in front of it (R. 241, 242). Gatewood himself admitted that these sailors were noisy both before and after the accident when he was questioned as to why he did not put a lookout in the bow, and to which he answered because "on my boat you

couldn't hear anything with the men hollerin' and carrying on * * *" (R. 86). If it was too noisy for the lookout on the extreme bow, 28 feet from the pilot house, it is not unfair to conclude that it was noisy around the pilot house and that his attention was directed to these sailors, and that for this reason, he did not see the scow, nor hear the tug's whistles, nor accurately judge the course of the tug by her lights.

Here was a situation where both Gatewood and Martin admitted that they saw the towing lights on the tug; admitted that this meant that the tug had a tow alongside—not a tow on a hawser astern (R. 96)—and claimed that the tug was turning to port across the bow of the LILLIAN ANNE in violation of the port to port passage agreement. For these very reasons, they should have been on their toes, alert, watching for every evidence of the position of the tow, and yet they never saw the scow until the LILLIAN ANNE was on top of it.

The bow was the proper place on this vessel for stationing the lookout. The bow was 28 feet from the pilot house and at least 22 feet from the 261 sailors and their laughter and shouts. Besides the LILLIAN ANNE had a slight flare to her bow (R. 86), which might to some extent have blocked the view of one in the pilot house, of comparatively low lying objects on the water, such as the scow, but which could not block the view of one standing on the very tip of the bow of the steamer.

Columbus Underwood, for instance, standing only three feet in front of the pilot house of the LILLIAN ANNE clearly saw the scow at a distance of twelve

hundred feet (R. 240). Yet Captain Gatewood, in the pilot house, saw it at a distance of only 25 feet (R. 101).

It is hard to believe that at 6:40 A.M. on November 5th, with the weather clear and the visibility good, there was not sufficient light, with day breaking, for a pilot, alert and watchful, to have seen the scow, lanterns or no lanterns. We say this despite the fact that admittedly 6:40 A.M. was war time and not Eastern Standard time.

Graham Whitehurst, the government inspector, testified that he had no difficulty in seeing the outlines of the LILLIAN ANNE (R. 182). Leroy Jones, another impartial witness, said that it was just about daybreak (R. 184). Eugene Hudgins confirmed this (R. 110). Yet Gatewood and Martin insisted it was pitch black (R. 85, 127). The former testified on the subject of the lights: "Absolutely no light on the scow whatsoever, absolutely and positively" (R. 87). He said "If I had seen the scow I would have missed it" (R. 94, 95), and that if the scow had had lights on her he would have seen them (R. 95). But although he is now placing the sole cause of the accident on the failure of the scow to have lights, yet when he wrote into his log an account of the occurrence of this accident five minutes after his vessel had left the scene (R. 64, 101, 102, 145) and when the facts should have been fresh in his mind, he gave every detail leading up to the collision — all the whistles and bell signals and engine movements of the LILLIAN ANNE and the courses of the respective vessels *except the failure of the scow to have lights.*

When it is considered that a log entry written shortly after a collision is the master's own story of how the collision occurred, usually written with a studied effort to place his vessel in the most favorable light possible, it is amazing that Gatewood should have left out of his log account that feature of this collision which he now says was its sole cause.

We think it is fair to state from all that has been said above, that the alleged lack of lights on the scow was an after thought.

As further confirmation of the lack of attention being paid by those on the LILLIAN ANNE to the approaching tug FAIRWILL and the Scow 72-H, there is the uncontradicted fact that those on the LILLIAN ANNE did not, on their own admissions, hear either of the one whistle signals from the tug. Yet these signals were blown. The mate on the tug said he blew these signals. Practically everybody on the tug heard the second one-whistle. Leroy Jones, sitting on the dock, and Gray and Merritt (R. 210) on the tug, heard both of them clearly. Graham Whitehurst, E. Hudgins, and Woodard heard the second one-whistle. Yet no one on the LILLIAN ANNE heard either one-whistle signal. *Surely their attention was otherwise directed.*

Proctor for petitioner claims that the lanterns did not conform to the rule because the bow light did not show all around the horizon. But it certainly showed in the direction from which the LILLIAN ANNE approached, and this is sufficient. See *The Transfer No. 8, supra.* Witness after witness testified that this bow light could have been seen from any angle by a vessel

approaching from the bow as was the LILLIAN ANNE. The aft light was on the pump house on the stern near the center (R. 158). Proctor for Gatewood says it should have been in the corner, but nothing in the Rule which he himself quotes on page 19 of his brief, requires this.

We submit that the District Court's conclusion in its opinion and findings of fact No. 7 that the LILLIAN ANNE was at fault for not having a look-out properly placed and alert, was fully justified (R. 5, 14). The Circuit Court of Appeals upheld this finding (R. 280).

(6) There was no duty on the tug to blow danger signals or to go astern sooner than she did.

Petitioner argues that the tug should have reversed immediately when the mate on the tug saw the LILLIAN ANNE.

The distance at which he saw the LILLIAN ANNE was either four or five hundred yards, as he estimated it, or eight hundred yards as Gatewood estimated it. In no event was it seventy-five yards as stated by petitioner.

But petitioner says it makes no difference as to the distance, still immediately upon sighting the LILLIAN ANNE, the FAIRWILL should have reversed.

The very statement of this proposition shows its absurdity. Here are two vessels a long distance apart, the width of the harbor apart, one of them proposes a port to port passage which is perfectly feasible, the other assents and goes to starboard. There is nothing

in this situation to cause the second vessel to suddenly reverse and blow danger signals.

Although petitioner insists that the tug's engine was crippled, and insinuates that it did not have its usual power and could not control the scow, this was not true.

Both Whitehurst (R. 179) and Merritt (R. 206, 207), the engineer on the FAIRWILL testified positively that the trouble with the spray nozzle on the FAIRWILL had absolutely nothing to do with the effectiveness of the engine, either in backing or in going forward; that it was operating with its full force and power; that it had been slowed down merely to enable Merritt to more easily work on the engine; that the trouble was of a minor nature, first showing up in the form of a knock in the engine after the tug left Craney Island, and clearing up of itself before she reached the dredge.

Nor can we see why the tug upon seeing a red light a fifth to a half a mile away, should blow a danger signal, as petitioner argues.

Gatewood said there was no danger until the vessels were 600 feet apart (R. 87, 88).

The danger signal rule is usually resorted to when there is a misunderstanding.

But Hudgins did not misunderstand either the course or the signals of the LILLIAN ANNE. He had encountered the LILLIAN ANNE on what everybody admits was a meeting course (R. 41, 42). The LILLIAN ANNE had proposed a port to port passage (R. 42) by blowing a one whistle signal, to which he

had assented, and he had put his helm to the starboard. He then saw the LILLIAN ANNE turn to starboard also and show him her red light. There was nothing alarming in this. He watched the LILLIAN ANNE closely and he said she appeared to be swinging to her port and trimming him too close (R. 43). He blew a second one blast "to notify him that he is trimming me too close" (R. 43). But even then he thought she would pass clear. However, she continued to swing in toward the scow, and Hudgins put his engines full astern and blew three whistles to inform the LILLIAN ANNE as to what he was doing.

There was no misunderstanding in the beginning with both vessels following the requirements of a port to port passage. Up to the time the LILLIAN ANNE began to turn rapidly into the scow Hudgins was fully justified in believing that she would pass clear, and Gatewood admitted that had he turned to the starboard 20 feet when he was 100 feet from the scow, he would have missed the scow (R. 94, 95).

We know now that when the LILLIAN ANNE put her engines full speed astern this threw her bow to the left and into the scow (R. 82). We know also that the engineer on the LILLIAN ANNE gave her all she had on this maneuver regardless of damage to the engines (R. 226). The District Court thought that this full speed astern on the motor vessel's engines was the immediate cause of the collision. (See Finding of Fact No. 6, R. 13). And this seems most logical to us. Odd as it may seem, this collision might have been avoided had the LILLIAN ANNE cut down on her speed and

not reversed her engines, and thus maintained her course (R. 14).

But was the mate on the tug to be charged with knowledge of everything that was in Gatewood's mind, or which ought to have been in his mind, as the LILLIAN ANNE approached the FAIRWILL? He certainly did not know that putting the engines of the motor vessel full speed astern would swing the bow of the LILLIAN ANNE into the scow; nor did he know that the LILLIAN ANNE would leave her apparently safe port to port passage course and swing into the scow; and he certainly did not know and ought not to be charged with knowledge of the fact that Gatewood did not see the lights on the scow. *All he knew, and all he ought to be charged with, was that the LILLIAN ANNE was approaching on a course which would have carried her safely past the scow until she got very close when she began suddenly to swing into the scow. Then it was too late for him to do anything except to blow his backing signal and go astern on his engines.*

The Geo. L. Garlick, 91 F. 920, 926.

The Manhasset (D.C. E.D. Va.), 34 F. 408, 423.

The Circuit Court of Appeals said:

> "We find no merit in the contention that the FAIRWILL should have refused assent to the proposed port to port passage, and should have immediately given a danger signal." (R. 280).

(7) The navigators of the LILLIAN ANNE were guilty of very gross negligence causing this collision.

Petitioner contents itself by merely stating that there was no negligence on the part of the LILLIAN ANNE, and wisely refrains from any detailed argument on this point.

We have already shown that the navigators of the LILLIAN ANNE were negligent in failing to see the lights of the scow at any time, although every one else saw these lights, and they were certainly lit and burning brightly and properly placed on the scow.

In addition, Gatewood and Martin failed to see the scow itself until his vessel was 25 feet from it, although the negro deck hand saw it 1200 feet away (R. 101, 239), but did not report this to the wheelsman.

Also Gatewood testified that he blew a one whistle signal on a meeting course intending a port to port passage (R. 79, 80). He said he received no reply to this signal. Yet the LILLIAN ANNE continued on at full speed for a distance of 600 yards in a crowded harbor. This is negligence.

The City of Chester (C.C.A. 4), 78 F. 186;
Construction Aggregates v. Long Island R.R. (C.C.A. 2), 105 F. (2) 1009, 1012.

Admittedly, the LILLIAN ANNE was the unencumbered vessel, whereas the tug had a tow alongside. It was the duty of the LILLIAN ANNE to avoid risk of collision. This duty she did not perform.

The Georgetown (C.C.A. 4), 135 F. 854, 858;
The Syracuse, 9 Wall. 672;
The Westhall (D.C.E.D. Va.), 153 F. 1010;
The Columbia (C.C.A. 4), 207 F. 929;
The Davidson (D.C.E.D. Va.), 244 F. 480, affirmed C.C.A. 4, 251 F. 887.

The LILLIAN ANNE immediately after the collision backed off and passed on down the river without speaking to those on the tug and scow, or making any investigation as to their need of assistance. This was a violation of the Stand-by Act (U.S.C.A. 33, Sec. 367).

The last sentence of this Act holds that if the master of a vessel fails to stand-by and fails to render assistance to the damaged vessel "the collision shall in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default."

The Lizzie Crawford (D.C.E.D. Va.), 170 Fed. 837;
The Robert Graham Dun (C.C.A. 1), 70 Fed. 270;
The Clara Matthieu (D.C.D. Mass.), 25 Fed. (2) 123.

Lastly, both the District Court and the Circuit Court of Appeals held that the LILLIAN ANNE was guilty of negligence in that she was proceeding at an excessive speed in a busy and crowded harbor (R. 9, 281).

The LILLIAN ANNE's gross negligence was clearly established and there was a heavy burden on her

to prove the negligence of the tug. Every reasonable doubt with regard to the propriety of the conduct of the tug and scow should be resolved in their favor.

The City of New York, 147 U.S. 72, 37 Led. 84, 90;
The Oregon, 158 U.S. 186, 39 Led. 943, 949;
The Eagle (C.C.A. 9), 289 F. 661.

We respectfully submit that petitioner is in error when she states on page 29 of her brief that there was no negligence in the navigation of the LILLIAN ANNE. The negligence was so gross that it was practically admitted by Gatewood during his cross-examination (R. 94, 101), when he testified reluctantly, that had he altered the course of his vessel as little as 20 feet when the vessels were 100 feet apart, the collision would not have occurred.

V. CONCLUSION

The real questions in this case are all of fact. There was substantial evidence to support the findings of fact in this case; they were made by two competent and careful courts, and under the decisions of this court a review is unnecessary. No conflict with local decisions and no departure from the accepted and usual course of judicial procedure has been shown. The case was correctly decided below, and we, therefore, respectfully submit that the petition for writ of certiorari should be denied.

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